ST 02-0269-GIL 12/23/2002 NEXUS

This letter discusses the issue of nexus. See Quill v. North Dakota, 112 S. Ct. 1902 (1992). (This is a GIL).

December 23, 2002

Dear Xxxxx:

This letter is in response to your letter dated October 16, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at the Department's Website at http://www.revenue.state.il.us/Laws/regs/part1200/.

In your letter, you have stated and made inquiry as follows:

> Given the circumstances below does this constitute nexus in Illinois causing our client, AAA to file a sales tax report and a state tax return?
>
> Our client, which is incorporated and located in the STATE, manufactures and sells steel buildings. These buildings are manufactured to a certain design and an employee of the company who is a licensed engineer in Illinois certifies the design. The employee resides in Louisiana. The building is then shipped in parts via third party with the title transferring here in STATE. The customer is responsible for the assembly of the building once it is shipped out. The corporation is registered in Illinois via registered agent and already files a sales tax report and state tax return.
>
> Please send a written copy or of your answer to us in the provided self-address stamped envelope for our records.

Determinations regarding the subject of nexus are normally very fact specific and we cannot make a specific determination on this issue in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a corporation would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection duties from their Illinois customers.

Out-of-state retailers are considered to fall within the definition of a "retailer maintaining a place of business in Illinois" (defined in the enclosed copy of 86 Ill. Adm. Code 150.201) when they perform any of the types of activities listed in 86 Ill. Adm. Code 150.201(i). The provisions of this regulation are subject to the U.S. Supreme Court ruling of Quill v. North Dakota, 112 S. Ct. 1902 (1992), in which the Supreme Court set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. Quill invoked a two-prong analysis consisting of 1) whether the Due Process Clause is satisfied, and 2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied, Quill at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not require an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, even if temporary, will trigger Use Tax collection responsibilities.

The concept of substantial nexus has been discussed by the U.S. Supreme Court in other cases. It is important to remember that the U.S. Supreme Court in its analysis of the Commerce Clause has concluded that the Constitution confers no immunity from State taxation on interstate commerce and that interstate commerce must bear its fair share of the state tax burden, assuming, of course, the existence of nexus between the taxing jurisdiction and the business or activity being taxed. Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 444 (1979); Goldberg v. Sweet, 488 U.S. 252 (1989).

As long as the conditions of the four-part test established by the U.S. Supreme Court in Complete Auto Transit v. Brady (1977), 430 U.S. 274, 279, are fulfilled, no impermissible burden on interstate commerce will exist. These four parts are whether the tax:

(1) is applied to an activity with a *substantial nexus* to the taxing state;

(2) is fairly apportioned;

(3) does not discriminate against interstate commerce; and

(4) is fairly related to the services provided by the State.

We note your letter states that the client is registered with Illinois for sales tax purposes. So long as that is the case, it should continue to collect and remit tax on transactions where it makes deliveries to Illinois customers.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.